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# ***VOLUNTEER IMMUNITY AND LOCAL GOVERNMENT***

*Every jurisdiction in Australia has now enacted legislation to protect volunteers of local government from incurring personal civil liability. Local government will be affected by these laws, most jurisdictions transferring liabilities incurred by a volunteer to it. This article examines the background to these reforms before undertaking a detailed examination of how the legislation in each jurisdiction addresses the issue of volunteer protection as it applies to local governments and their volunteers. The article concludes by proposing some areas in which reform would benefit local government's ability to deal with the liabilities imposed by the legislation.*

Considerable changes have been made to Australian tort law in recent years as a response to government and community concerns about civil liability and affordable insurance premiums – otherwise known as the “public liability crisis”.<sup>1</sup> The rise in public liability insurance premiums has been particularly felt by local governments due to their wide range and scale of activities exposing them to public liability claims. As a result, local governments have increasingly found themselves either unable to pay increases in insurance or unable to access insurance for certain events and activities. The intensity with which these changes have taken place is unprecedented in Australia. The object of this reform, as identified by the State, Territory and Commonwealth Ministerial Meetings on Public Liability Insurance, is to strike a balance between the interests of injured people and the community at large. It is intended the changes to the law will take the pressure off insurance premiums, while still maintaining adequate protection for consumers.<sup>2</sup> The insurance industry is expected to deliver affordable public liability products to the community on the basis of these reforms.<sup>3</sup>

Many of the provisions in the reform legislation are directed solely at “public authorities” and are positive outcomes for local government.<sup>4</sup> The reintroduction in many jurisdictions of the highway immunity or non-feasance (as opposed to misfeasance) rule<sup>5</sup> - removed by the High Court in *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512 - is such an example. In most jurisdictions, however, a road authority will not be able to rely on the rule as a

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<sup>1</sup> Clark SS and McInnes R, “Unprecedented Reform: The New Tort Law” (2004) 15 *Insurance Law Journal* 1 at 1.

<sup>2</sup> Commonwealth of Australia, *Joint Communique – Ministerial Meeting on Public Liability* (Canberra, 2 October 2002) <<http://assistant.treasurer.gov.au/atr/content/publications/2002/20021002.asp>> viewed 29 July 2004.

<sup>3</sup> Commonwealth of Australia, *Joint Communique – Ministerial Meeting on Public Liability* (Canberra, 30 May 2002) <<http://assistant.treasurer.gov.au/atr/content/publications/2002/20020530.asp>> viewed 29 July 2004.

<sup>4</sup> “Council” is included in the definition of “public or other authority” in the *Civil Liability Act 2003* (Qld), s 34; *Civil Liability Act 2002* (NSW), s 41; *Civil Liability Act 2002* (WA), s 5U; *Wrongs Act 1958* (Vic), s 79; *Civil Liability Act 2002* (Tas), s 37.

<sup>5</sup> *Civil Liability Act 2003* (Qld), s 37 (1); *Civil Liability Act 2002* (NSW), 45 (1); *Civil Liability Act 1936* (SA), s 42 (1); *Civil Liability Act 2002* (WA), s 5Z (2); *Transport Act 1983* (Vic), s 37A (1); *Civil Liability Act 2002* (Tas), s 42 (1).

defence where they had actual knowledge of the particular risk that caused the harm.<sup>6</sup> Other examples (although not uniform across all jurisdictions) include the introduction of specific principles that apply in determining whether public authorities have a duty of care, or have breached a duty of care<sup>7</sup> and a policy defence for the wrongful exercise, or failure to exercise, statutory powers or public functions.<sup>8</sup> The addition of these principles will act to alter local government's exposure to costly claims by determining the negligence of a council in accordance with principles that are suited to its unique situation, in tandem with the general principles of the law of negligence.<sup>9</sup>

A minor element of the tort law reform has involved the protection of volunteers from personal civil liability. The reform legislation in all Australian jurisdictions offers protection to volunteers of "community organisations" from incurring personal civil liability to others in their performance of "community work". Local government is either explicitly named in the definition of a community organisation or would qualify as a community organisation. In general, the local authority is made liable for the acts and omissions of the volunteer with no or limited recourse to the volunteer. Previously, statutory protection for volunteers was restricted to specific classes of people, such as fire fighters and rescue workers, and to particular kinds of activities. There are, however, exceptions to the availability of protection, and not all types of liability are covered.

Local government is increasingly engaging volunteers in all facets of its operations. A study conducted by the Australian Bureau of Statistics (ABS) over activities in the 1999-2000 financial year recorded there were 502 local government organisations involved in the direct provision of community services, engaging some 17,954 volunteers in the month of June 2000.<sup>10</sup> The volunteer protection provisions will have a considerable impact on the delivery of these community services provided by local government, as under most of the state and territory legislation, liabilities incurred by volunteers that are granted immunity will be transferred to the local government who organised the community work.<sup>11</sup>

This transfer of liability is analogous to the common law principle of vicarious liability and creates a statutory exception to the basic rule that vicarious liability only attaches to the relationship of employer and employee. Its embodiment in legislation also clarifies some of the common law uncertainty regarding the legal position of

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<sup>6</sup> *Civil Liability Act 2003* (Qld), s 37 (2); *Civil Liability Act 2002* (NSW), 45 (1); *Civil Liability Act 2002* (WA) s 5Z (2); *Civil Liability Act 2002* (Tas), s 42 (1).

<sup>7</sup> *Civil Liability Act 2003* (Qld), s 35; *Civil Liability Act 2002* (NSW), 42; *Civil Liability Act 2002* (WA), s 5W; *Wrongs Act 1958* (Vic), s 83; *Civil Liability Act 2002* (Tas), s 38.

<sup>8</sup> *Civil Liability Act 2003* (Qld), s 36; *Civil Liability Act 2002* (NSW), 43A; *Civil Liability Act 2002* (WA), s 5X; *Wrongs Act* (Vic), s 84; *Civil Liability Act 2002* (Tas), 40; *Civil Law (Wrongs) Act* (ACT), s 111.

<sup>9</sup> For a discussion of the impact of these legislative changes in New South Wales see Gemell G and Sun D, "Liability of Public Authorities" (2003) 9 (1) *Local Government Law Journal* 21 at 28-32.

<sup>10</sup> Australian Bureau of Statistics, *Community Services, Australia* (Cat No 8696.0, Canberra, 2001), p 13.

<sup>11</sup> *Volunteer Protection Act 2001* (SA), s 5 (1); *Volunteer (Protection from Liability) Act 2002* (WA), s 7 (1); *Wrongs Act 1958* (Vic), s 37 (2); *Civil Liability Act 2002* (Tas), s 48 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 9 (1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (3); *Commonwealth Volunteers Protection Act 2003* (Cth), s 7.

volunteers to a community organisation.<sup>12</sup> At one end of the spectrum, volunteers do not fit into the established relationships of vicarious liability. Clearly they are not employees as there is no contract of service between the parties and no consideration or payment for services. They are also not independent contractors as there is no contract for services, and they are typically not agents.<sup>13</sup> At the other end of the spectrum, a number of cases have suggested, indirectly, that the relationship of vicarious liability attaches to the actions of volunteers.<sup>14</sup> Although these cases are not directly on point, they do serve to show signs of judicial movement in the direction. On the basis that the driving force behind vicarious liability is one of public policy, rather than common law principles,<sup>15</sup> there seems no reason why a court could not justify adding the volunteer relationship to the other recognised relationships. While this debate will have no effect in jurisdictions in which the transfer of liability is made clear, they may be persuasive in Queensland and New South Wales as these jurisdictions have not made an explicit statutory transfer of liability in their legislation.

The consequence of the volunteer protection reforms is that local government must ensure risk management of its volunteer liability is in place. Risk management of potential liabilities will include making sure that there are adequate systems to ensure volunteers are trained, supervised and effectively managed, and there is insurance if it is available and cost effective. This article informs the risk management process by describing the background to the civil liability reforms and then undertaking a detailed examination of how the legislation in each jurisdiction addresses the issue of volunteer protection as it applies to local governments. It will then go on to propose some reforms to the provisions.

## **BACKGROUND TO THE REFORMS**

### ***The Public Liability Insurance Crisis and Local Government***

In early 2001, a long, soft insurance market cycle ended and all sectors of the economy started to experience the effects of a hard market. Insurance markets run in cycles. A “soft period” is a buyer’s market where premiums are low and insurance companies actively compete for business. This is followed by a “hard” market that is a seller’s market, where premiums rise without any relation to loss history or profile; insurers leave part of the market, or leave the market all together, through insolvency. This was exacerbated in Australia by the collapse of HIH, which had a substantial share of the public liability market priced below a sustainable level. Through the emergence of the “hard market”, public liability insurance premiums have risen dramatically. The Australian Competition and Consumer Commission’s (ACCC)

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<sup>12</sup> See McGregor-Lowndes M, “Volunteer Protection in Queensland” (2003) 24 *Queensland Lawyer* 81 at 88-93.

<sup>13</sup> Ipp, DA, Crane P, Sheldon D and Macintosh I, *Final Report of the Review of the Law of Negligence*, (Canberra, 2 October 2002), p 170 (Ipp Report ).

<sup>14</sup> *Pratt v Patrick* [1924] 1 KB 488; *Duncan by her next friend v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* [1988] ACTSC 109 (14 October 1988) at [42]; *Smoldon v Whitworth* [1997] ELR 249; *Vowles v Evans & The Welsh Rugby Union Ltd, Davey & Taylor* [2002] EWHC 2612 (QB).

<sup>15</sup> *State of NSW v Lepore, Samin v State of Queensland; Rich v State of Queensland* (2003) 212 CLR 511 per Gleeson CJ at 553; (2003) 195 ALR 412. See also Queensland Law Reform Commission, *Vicarious Liability*, Report No 56 (Brisbane, December 2001) p 9.

monitoring reports on public liability and professional indemnity insurance found that after a decade of relative stability public liability insurance premiums began to rise by an average of 10 per cent in 2000, followed by further rises of 19 per cent in 2001, 44 per cent in 2002<sup>16</sup> and a relatively small rise of 4 per cent for the first six months of 2003.<sup>17</sup>

This rise in public liability insurance premiums has been particularly felt by local government. Due to the range of activities undertaken by local authorities they are exposed to public liability insurance claims more than any other sector of the community. In March 2002, the Australian Local Government Association (ALGA), in their submission to the Ministerial Meeting on Public Liability, identified some of the concerns of local government over the spiralling cost of public liability insurance. These included:

- the inability to pay increases in public liability insurance;
- the inability to access public liability insurance for certain events and activities; and
- where they can access and afford public liability insurance coverage, the increased costs mean sacrificing on some existing functions and/or raising charges on events and activities.<sup>18</sup>

The effect of these problems has forced local government authorities to cancel a wide variety of events. For example, in the first 3 months of 2002 in New South Wales 27 events were reported as cancelled or closed directly as a result of public liability insurance.<sup>19</sup> This decrease in service provision brought into question the capacity of local governments to sustain into the future the range of community services previously provided. Many local governments advocated tort law reform as the public liability insurance crisis had wide ranging effects on community cohesion, the availability of recreational activities and cultural identity in local areas.<sup>20</sup>

Other factors have also had their part to play in the public liability crisis. Among these is the rapid development of the common law of negligence.<sup>21</sup> From the 1960s to the 1990s there was significant judicial expansion of the law of negligence, the courts extending the circumstances in which negligence may have been found to have occurred and the scope of damages recoverable considerably.<sup>22</sup> This expansion of the law of negligence has been particularly felt by local governments.<sup>23</sup> The Chief Justice

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<sup>16</sup> Australian Competition and Consumer Commission, *Public Liability and Professional Indemnity Insurance Monitoring Report* (Canberra, July 2003) p 6.

<sup>17</sup> Australian Competition and Consumer Commission, *Public Liability and Professional Indemnity Insurance Second Monitoring Report*, (Canberra, January 2004) p 15.

<sup>18</sup> Australian Local Government Association, *Submission to ministerial meeting on public liability insurance issues* (22 March 2002) <<http://www.alga.asn.au/submissions/publicLiabilitySub.php>> viewed 26 July 2004.

<sup>19</sup> Australian Local Government Association, n 18.

<sup>20</sup> Australian Local Government Association, n 18.

<sup>21</sup> See Clare Cappa, Craig Forrest, Russel Hinchy & Veron Nase, "Tort Deform or Tort Reform? Winding Back the Clock on Negligence" (2003) 28 (5) *Alternative Law Journal* 212.

<sup>22</sup> Clark & McInnes, n 1 at 2.

<sup>23</sup> For example, see: *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

of the Supreme Court of New South Wales, the Hon JJ Spigelman AC, has remarked extrajudicially that this historical trend has been determined to a very substantial extent by the assumption that the defendant is insured. In his Honour's words:

The proposition that any degree of fault – whether minor or gross – justifies the compensation for the whole of a plaintiff's loss – whether catastrophic or minor – may not have been applied in quite the same way, in the absence of the ubiquity of insurance.<sup>24</sup>

So what happens when insurance is not available? How does this affect the common law of negligence? The recent legislative intervention into this area suggests that the community is not prepared to pay for the level of compensation which the judiciary, and the legal profession generally, has come to regard as appropriate.<sup>25</sup> There are, however, signs that public concern about tort law expansion is being recognised at the judicial level. In the recent High Court decision of *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 354, McHugh J declared:

I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable.

However, such a judicial retreat does not assist in the resolution of a long tail of liability claims which still face local authorities.

### ***Developments in Volunteer Protection in the US and Australia***

The United States pioneered volunteer protection legislation after their “civil liability crisis” in the late 1980s, with all states and the federal jurisdiction subsequently enacting legislation to protect volunteers from personal civil liability. The federal *Volunteer Protection Act of 1997*<sup>26</sup> (VPA) in the United States sets out minimum legislative protections across all jurisdictions applicable to volunteers (including directors, officers and trustees)<sup>27</sup> serving in nonprofit organisations and governmental entities. No volunteer can be held liable for harm, defined as physical, non-physical, economic and non-economic losses,<sup>28</sup> caused by an act performed in the context of their volunteer duties if:

- the volunteer was acting in the scope of his or her duties;
- the volunteer was properly licensed, certified, or authorized by the appropriate authorities (if such license, certification, or authorization was required for the activities performed);
- the harm was not caused by wilful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

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<sup>24</sup> The Hon JJ Spigelman, “Negligence: the Last Outpost of the Welfare State” (2002) 76 *Australian Law Journal* 432 at 433.

<sup>25</sup> Spigelman, n 24 at 434.

<sup>26</sup> *The Volunteer Protection Act 1997* 42 U.S.C., §§ 14501-14504.

<sup>27</sup> *The Volunteer Protection Act 1997* 42 U.S.C., § 14505 (6).

<sup>28</sup> *The Volunteer Protection Act 1997* 42 U.S.C., § 14505 (2).

- the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the forum state requires the operator or owner of the vehicle to possess an operator's license or maintain insurance.<sup>29</sup>

The federal legislation pre-empts state laws to the extent they are inconsistent, but it does not pre-empt state laws that provide for greater protection from liability.<sup>30</sup> That is, state laws may provide greater protection to volunteers than the federal Act, but not less. For example, a state may allow a volunteer to be liable only in cases of criminal misconduct but could not allow a volunteer to be liable for ordinary negligence.<sup>31</sup> In the situation where a volunteer can be held liable, the Act also operates to limit the amount of recovery available to the injured person.<sup>32</sup>

The VPA, however, does not provide protection to the nonprofit organisation or the governmental body that organises the services of volunteers for liabilities their volunteers may incur.<sup>33</sup> Nor does it protect a volunteer from liability to the nonprofit organisation or governmental body.<sup>34</sup> This omission leads to the result that an organisation can still take civil action against its volunteers, despite the immunity given by the statute. Exemptions also apply in certain circumstances, such as where the volunteer's actions constitute a crime of violence or a sexual offence.<sup>35</sup> Australia has departed from the American provisions in a number of areas. These differences will be discussed below.

In Australia, the International Year of the Volunteer in 2001 focused attention on the celebration of the thirty two percent of the Australian adult population that contributed 704.1 million hours of voluntary work in 2000, an increase on the 1995 figure of 511.7 million.<sup>36</sup> The equivalent wages of this work would be \$8.9 billion.<sup>37</sup> The Year of the Volunteer also generated a number of policy statements about volunteers. A common feature of the statements was that volunteers should be protected from risk.

Volunteering Australia, the national peak body working to advance volunteering in the Australian community, created a number of statements in consultation with volunteer involving organisations and the nonprofit sector. Of them, the *National Agenda on Volunteering: Beyond the International Year of Volunteers* states:

Many volunteers are exposed to risk, injury, discrimination or prejudice in the absence of explicit mention in legislation. Others carry huge financial responsibility or are exposed to legal liability. It is in the interests of all Australians that volunteers are protected under law.<sup>38</sup>

<sup>29</sup> *The Volunteer Protection Act* 1997 42 U.S.C., § 14503 (a).

<sup>30</sup> *The Volunteer Protection Act* 1997 42 U.S.C., § 14502.

<sup>31</sup> John Beavers, *The Federal Volunteer Protection Act of 1997* (2000)

<<http://www.npaction.org/article/articleview/420/1/153/>> viewed 5 August 2004.

<sup>32</sup> *The Volunteer Protection Act* 1997 42 U.S.C., § 14503 (e), 14504.

<sup>33</sup> *The Volunteer Protection Act* 1997 42 U.S.C., § 14503 (c).

<sup>34</sup> *The Volunteer Protection Act* 1997 42 U.S.C., § 14503 (b).

<sup>35</sup> *The Volunteer Protection Act* 1997 42 U.S.C., § 14503 (f).

<sup>36</sup> Australian Bureau of Statistics, *Voluntary Work* (Cat No 4441.0, Canberra, 2001) p 3.

<sup>37</sup> Australian Bureau of Statistics, *Non-profit Institutions Satellite Account*, (Cat No 5256.0, Canberra 2002) p 9.

<sup>38</sup> Volunteering Australia Inc, *A National Agenda on Volunteering: Beyond the International Year of Volunteers* (Volunteering Australia, 2001) p 4.

The Volunteering Australia model code of practice for organisations involving volunteer staff requires that the organisation will provide volunteer staff with “a healthy and safe workplace” and “appropriate and adequate insurance coverage”.<sup>39</sup> The code of volunteer rights published by the same organisation also states that a volunteer has the right “to be adequately covered by insurance”.<sup>40</sup>

The issues raised in these policy statements were a response to the general unease of volunteers about the prospect of civil liability litigation, expressed well before the tightening global insurance market. This concern expressed by volunteers about their civil liability exposure was the driving force behind the South Australian Parliament passing the *Volunteer Protection Act 2001* (SA), the first of its kind in Australia. The South Australian Government identified that a major disincentive to volunteering is the prospect of a volunteer incurring serious personal liability for damages and legal costs in proceedings for negligence. It believed that a reasonable balance could be maintained between the rights of those injured to receive compensation and the need to protect a volunteer from personal liability:

- (a) by limiting the personal liability for negligence of a volunteer who works for a community organisation and transferring the liability that would apart from this Act attach to the volunteer to the community organisation; and
- (b) by limiting the right to bring proceedings against the volunteer personally and hence reducing the risk to a volunteer of incurring legal costs as a result of the voluntary work.<sup>41</sup>

Is this threat of legal liability by volunteers, although a very real perception, actually a present reality? There appears to be a disconnection between the fear felt by volunteers and actual litigation. Although volunteers themselves regularly seek compensation from community organisations when injured in performing their activities,<sup>42</sup> and reported cases against community organisations (rather than individual volunteers) receive general publicity in the popular press, there are few, if any, reported cases of volunteers being sued for actions arising out of their volunteer activities. Of these, the majority appear to arise from activities conducted by volunteer office bearers<sup>43</sup> and referees of sporting events.<sup>44</sup> In the United States,

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<sup>39</sup> Volunteering Australia Inc, “Model Code of Practice for Organisations involving Volunteer Staff” (Volunteering Australia, 2003)

<[http://www.volunteeringaustralia.org/sheets/InfoSheets\\_PDF/Model\\_Code.pdf](http://www.volunteeringaustralia.org/sheets/InfoSheets_PDF/Model_Code.pdf)> viewed 2 August 2004.

<sup>40</sup> Volunteering Australia Inc, “Volunteer Rights” (Volunteering Australia, 2003)

<[http://www.volunteeringaustralia.org/sheets/InfoSheets\\_PDF/Volunteer\\_Rights.pdf](http://www.volunteeringaustralia.org/sheets/InfoSheets_PDF/Volunteer_Rights.pdf)> viewed 2 August 2004.

<sup>41</sup> *Volunteer Protection Act 2001* (SA), Preamble.

<sup>42</sup> For examples of cases about volunteers seeking compensation, see *Lanyon v Noosa District Junior Rugby League Football Club Inc* [2001] QSC 431; *Di Bella v La Boite Theatre Inc and Cairns City Council* (Unreported, District Court of Queensland, No 113 of 1999, 15 February 2001); *Mt Isa Basketball Association v Anderson* (Unreported, Queensland Court of Appeal, No 8317 of 1996, 3 October 1997), BC9705110.

<sup>43</sup> The most notable case of a volunteer office bearer was *Commonwealth Bank of Australia v Freidrich & Ors* (1991) 9 ACLC 946; (1991) 5 ACSR 115. See McGregor-Lowndes M, “Non-profit Corporations – Reflections on Australia’s Largest Nonprofit Insolvency” (1995) 5 (4) *Australian Journal of Corporate Law* 417.

<sup>44</sup> *Smoldon v Whitworth* [1997] ELR 249; *Vowles v Evans and the Welsh Rugby Union Ltd* [2002] EWHC 2162 (QB).



before the introduction of the VPA, although there were a number of high profile cases, there was no data to support a widespread targeting of volunteers.<sup>45</sup> Few nonprofits, and even fewer volunteers, are ever sued.<sup>46</sup> Supporters of volunteer protection in the United States, however, have been careful to emphasise that the *perception* of potential volunteers concerning their exposure to liability is as important as the *reality* of the situation.<sup>47</sup> A 1988 study by the Gallup Organisation, for example, found that one in ten nonprofit organisations had experienced at least one resignation by a volunteer because of liability concerns, and that one in six volunteers reported withholding his or her services to avoid potential lawsuits.<sup>48</sup>

Few volunteers appear to understand public liability protection afforded to them by their household insurance policies. Household insurance policies commonly provide public liability coverage which is drafted widely enough to cover activities undertaken as a volunteer. It is common for most Australian household insurance policies to provide up to \$10 million coverage for legal liability to pay for compensation arising from an incident which causes death or bodily injury to those outside the household or loss or damage to their property.<sup>49</sup> These policies generally cover activities undertaken in Australia and New Zealand, and will extend to those who live in the household such as spouses, partners and defactos of the insured, as well as their unmarried brothers and sisters, parents, parents in law and children. We estimate that only three quarters of the Australian population would be protected by their household insurance policies, should they be the subject of a claim for personal injury or death or loss or damage to property.<sup>50</sup> The usual exclusions from such a provision are events while the insured is involved as a committee member or director of a club or association, or as a coach, referee or official at a game or organised sporting activity. These exclusions give a good indication of where the real risk lies for Australian volunteers in litigation.

Whether the fear of liability is more perceived than real, what is the possible effectiveness of volunteer protection legislation? Research in the United States reveals that, three years after the VPA was introduced, the number of suits filed against volunteers had not declined.<sup>51</sup> It explains this by reference to the fact that the

<sup>45</sup> Constantine G, "How Landmark Legislation Evolved" (1997) 49 (8) *Association Management* 37 at 37-8.

<sup>46</sup> Martinez JM, "Liability and Volunteer Organizations: A Survey of the Law" (2003) 14 (2) *Nonprofit Management & Leadership* 151 at 155.

<sup>47</sup> Constantine, n 45 at 37.

<sup>48</sup> Constantine, n 45 at 37-38.

<sup>49</sup> For example, see: Suncorp Metway, *Home and Contents Insurance Product Disclosure Statement* (Suncorp Metway, 2004) p 32-33

<[http://www.suncorp.com.au/suncorp/legal/pds\\_download/insurance.html](http://www.suncorp.com.au/suncorp/legal/pds_download/insurance.html)> viewed 9 August 2004; QBE, *Home Contents, Insurance Product Disclosure Statement and Policy Wording* (QBE, 2004) p 36 <<http://www.qbe.com/australia/western/index.html>> viewed 9 August 2004; RACQ, *Household Insurance Policy, Product Disclosure Statement* (RACQ, 2004) p 38 <[www.racq.com.au](http://www.racq.com.au)> viewed 9 August 2004.

<sup>50</sup> A 2002 study by the Insurance Council of Australia (ICA) on non-insurance and under-insurance in the home and small business sector showed that of the 7.2 million households in Australia in the 1998/1999 year, 1.8 million, or 25 %, had no household insurance cover: Insurance Council of Australia, *Report on Non-Insurance/Under-Insurance in the Home and Small Business Portfolio* (Doc No. MP008-1610, ICA, 2002) p 10-16 <<http://www.ica.com.au/publications/noninsurance.pdf>> viewed 10 August 2004.

<sup>51</sup> Non-Profit Risk Management Center, *State Liability Laws for Charitable Organizations and Volunteers* (Washington DC, 2001) p 12.

VPA does not prohibit lawsuits but provides a limited defence, and furthermore that VPA “may be helpful to plaintiffs seeking damages from volunteers, in that it makes it clear how a suit must be styled to require a review of the facts by a judge or jury.”<sup>52</sup> Although there are substantial differences between the VPA and the Australian approach, only time will tell whether the provisions will increase litigation. The Explanatory Memorandum to the Commonwealth legislation revealed that:

In the last five years there has not been a significant number of claims by third parties against volunteers or the Commonwealth in respect of services performed by volunteers for the Commonwealth.<sup>53</sup>

Furthermore, the Explanatory Memorandum claims “it seems unlikely this Bill will result in a significant increase in the number of claims arising from the activities of volunteers”.<sup>54</sup> It would be ironic if the provisions legislated to redress a perceived liability need in fact resulted in actual liability litigation becoming more common.

### ***The Ipp Report***

The recent Australian tort law reform is based on the Commonwealth, state and territory governments’ jointly established *Review of the Law of Negligence* (Ipp Report),<sup>55</sup> a measure agreed to at the Ministerial Meeting on Public Liability Insurance on 30 May 2002.<sup>56</sup> The review was intended to play a key role in informing a coordinated national approach, by providing a series of proposals which would provide a principled approach to reforming the law as it applies to public liability, professional and medical indemnity.<sup>57</sup> However, not all of its recommendations were strictly followed.

The Panel’s terms of reference included addressing the principles applied in negligence to limit the liability of public authorities.<sup>58</sup> The report incorporated a number of recommendations including that a lower standard of care should be introduced where a public authority is performing a public function so that they cannot be found negligent for “policy decisions” (that is, based on financial, economic, political or social factors or constraints) unless the decision is so unreasonable that no public functionary could have made it.<sup>59</sup> This provision was included in most of the subsequent state and territory legislation.<sup>60</sup>

In respect of volunteer liability, the Ipp report stated:

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<sup>52</sup> Non-Profit Risk Management Center, n 51, p 12.

<sup>53</sup> Explanatory Memorandum, Commonwealth Volunteers Protection Bill 2002 (Cth) 2.

<sup>54</sup> Explanatory Memorandum, Commonwealth Volunteers Protection Bill 2002 (Cth) 2.

<sup>55</sup> Ipp Report, n 13.

<sup>56</sup> Commonwealth of Australia, *Joint Communiqué – Ministerial Meeting on Public Liability* (Canberra, 30 May 2002)

<<http://assistant.treasurer.gov.au/atr/content/publications/2002/20020530.asp>> viewed 29 July 2004.

<sup>57</sup> *Minister Announces Review Panel*, Press Release, Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan, 2 July 2002.

<<http://assistant.treasurer.gov.au/atr/content/pressreleases/2002/076.asp>> viewed 2 August 2004.

<sup>58</sup> Ipp Report, n 13, p 151.

<sup>59</sup> Ipp Report, n 13, p 157-8, Recommendation 39.

<sup>60</sup> See n 7-8.

The Panel is not aware of any significant volume of negligence claims against volunteers in relation to voluntary work, or that people are being discouraged from doing voluntary work by the fear of incurring negligence liability [and has decided] to make no recommendation to provide volunteers as such with protection against negligence liability.<sup>61</sup>

Notably, it did not recommend the imposition of liability on a community organisation for the acts and omissions of its volunteers. The Panel felt that to do so would be in conflict with their terms of reference to limit liability for negligence as it may “adversely affect the interest of not-for-profit community organisations”.<sup>62</sup> However, neither of these recommendations were followed as there had already been agreement at the Second Ministerial Meeting on Public Liability Insurance for the protection of volunteers.<sup>63</sup> Consequently, provisions were included in all jurisdictions in the subsequent tort reform legislation to provide for volunteer protection.

## **VOLUNTEER PROTECTION PROVISIONS**

### ***The Basic Framework***

The volunteer protection provisions in the state and territory jurisdictions adopt a similar model, but there are significant differences. Broadly, there are four criteria to be met before a volunteer can take advantage of the protection (the words in inverted commas are defined). A “volunteer” must:

- be working on a “voluntary basis”;
- be performing “community work” that is “organised” by a “community organisation”;
- come within an area of liability protected by the Act; and
- not fall within one of the recognised exceptions.

The Commonwealth Act<sup>64</sup> differs from the other jurisdictions as it only applies to the Commonwealth itself and its authorities. Consequently, there is no place for community organisations or community work. All volunteers engaged in community work for local government will only be able to gain protection under the state and territory legislation because of the limited protection afforded under the Commonwealth Act. However, it is worth noting that a volunteer will be unable to seek protection under a state or territory law when they incur a liability under a federal law because of the inconsistency between the state and federal laws.<sup>65</sup> Although this constitutional problem is unlikely to affect local governments, it will serve as a limit on what may have been a more comprehensive scheme.

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<sup>61</sup> Ipp Report, n 13, p 170.

<sup>62</sup> Ipp Report, n 13, p 170-171.

<sup>63</sup> Commonwealth of Australia, *Joint Communiqué – Ministerial Meeting on Public Liability* (Canberra, 30 May 2002)

<<http://assistant.treasurer.gov.au/atr/content/publications/2002/20020530.asp>> viewed 29 July 2004.

<sup>64</sup> *Commonwealth Volunteers Protection Act 2003* (Cth).

<sup>65</sup> *Commonwealth of Australia Constitution Act 1900* (Imp), s 109. A volunteer seeking protection for a liability incurred under either the common law or a state law will not encounter such a problem.

Despite the agreement to use the New South Wales provisions as a model to produce uniform law,<sup>66</sup> the scope of the protection afforded to volunteers differs significantly from jurisdiction to jurisdiction. The definitions of the core terms in the legislation vary, as do the exemptions to protection and types of liability protected. This lack of uniformity makes a comprehensive analysis of the provisions difficult.

### ***Who is a Volunteer?***

The legislation in all jurisdictions operates to protect people who are performing community work either as a “volunteer”, or on a “voluntary basis”, as defined. The basis of the definition of “volunteer” is quite traditional. In all jurisdictions, a person is considered a volunteer where they provide their services without payment.<sup>67</sup> In most jurisdictions, people can also receive remuneration of their reasonable expenses in doing the work, without it affecting their volunteer status.<sup>68</sup> “Reasonable expenses” are not defined in any jurisdiction; it is a phrase that in the future may be defined by judicial consideration. Volunteers who receive travel and meal expenses while doing voluntary work would probably be considered to be working on a voluntary basis as this is a common practice.

In all jurisdictions apart from Queensland and South Australia,<sup>69</sup> the provisions allow for regulations to specify a monetary limit that a volunteer is permitted to receive by way of remuneration before they lose their volunteer status. In addition, Western Australia<sup>70</sup> and Tasmania<sup>71</sup> have provisions that allow regulations to exclude persons performing particular functions from volunteer status. There are no such regulations at the time of writing.

In some jurisdictions,<sup>72</sup> a person who receives payment from their usual employer while performing voluntary work is also capable of achieving volunteer status. It is becoming increasingly popular for employers to encourage their workers to perform voluntary community services during work hours as a form of good corporate citizenship or social responsibility. The Brisbane City Council, for example, has endorsed a programme that allows its employees to use 7.15 hours (1 day) per year for voluntary work. In the state and territory jurisdictions, an employee who performs voluntary work can only receive volunteer status where they receive no remuneration

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<sup>66</sup> Commonwealth of Australia, *Joint Communiqué – Ministerial Meeting on Public Liability* (Canberra, 15 November 2002)

<[http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115\\_2.asp](http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115_2.asp)> viewed 29 July 2004.

<sup>67</sup> *Civil Liability Act 2003* (Qld), ss 38 (1), (2) (b); *Civil Liability Act 2002* (NSW), s 60 (2); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 4; *Wrongs Act 1958* (Vic), s 35; *Civil Liability Act 2002* (Tas), s 45; *Civil Law (Wrongs) Act 2002* (ACT), s 6; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>68</sup> *Civil Liability Act 2003* (Qld), ss 38 (2) (b); *Civil Liability Act 2002* (NSW), s 60 (2) (b); *Volunteer (Protection from Liability) Act 2002* (WA), s 4; *Wrongs Act 1958* (Vic), s 35; *Civil Liability Act 2002* (Tas), s 45; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>69</sup> *Civil Liability Act 2002* (NSW), s 60 (2) (b); *Civil Liability Act 2002* (Tas), s 45 (2) (b); *Wrongs Act 1958* (Vic), s 35 (2); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (5); *Volunteer (Protection from Liability) Act 2002* (WA), s 5 (2); *Civil Law (Wrongs) Act 2002* (ACT), s 6.

<sup>70</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 4 (1) (d).

<sup>71</sup> *Civil Liability Act 2002* (Tas), s 45 (1) (b).

<sup>72</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 4 (2) (a) (i); *Wrongs Act 1958* (Vic), s 35 (2) (a); *Civil Liability Act 2002* (Tas), s 45 (2) (a) (i); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7) (a) (i).

for doing the work other than remuneration that he or she would receive whether or not they did that work.<sup>73</sup> That is, they do not receive any ‘extra’ remuneration from the community organisation in addition to what they would receive from their normal employer.

All jurisdictions specify that a person performing community work under a court order is not entitled to volunteer status.<sup>74</sup> In addition, the Tasmanian,<sup>75</sup> Victorian<sup>76</sup> and Western Australian<sup>77</sup> provisions also specifically exclude particular classes of people from achieving volunteer status. In the main, these classes comprise those already absolved of civil liability in relation to the activity in question, such as fire fighters and wildlife officers performing their statutory duties.<sup>78</sup>

### ***What is a Community Organisation?***

The legislation in the state and territory jurisdictions only operates to protect volunteers who are engaged by community organisations. This is referred to as the organisational test.

It is clear that local governments will be considered community organisations in a number of jurisdictions. The phrase “local government” is explicitly included in the definition of “community organisation” in Queensland<sup>79</sup> and Western Australia.<sup>80</sup> In Victoria,<sup>81</sup> the definition is expressed to include “a municipal council or other incorporated local government body”, and in Tasmania<sup>82</sup> a “council”. This leaves no doubt that volunteers engaged by local government in these jurisdictions will meet the “organisational test”.

In other jurisdictions, while not explicit in the definition of community organisation, local government will be included. The legislation in South Australia<sup>83</sup> uses the phrase “a body corporate, and includes the Crown”. Similarly, the Northern Territory<sup>84</sup> and the Australian Capital Territory<sup>85</sup> use the phrases “a body corporate” and “a corporation” respectively. A local government is included in the definition of a community organisation in the Australian Capital Territory as a “body politic” is

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<sup>73</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 4 (2) (a) (i); *Wrongs Act 1958* (Vic), s 35 (2) (a); *Civil Liability Act 2002* (Tas), s 45 (2) (a) (i); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7) (a) (i).

<sup>74</sup> *Civil Liability Act 2003* (Qld), ss 38 (2) (a); *Civil Liability Act 2002* (NSW), s 60 (2) (a); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 4 (1) (3); *Wrongs Act 1958* (Vic), s 35 (3) (h); *Civil Liability Act 2002* (Tas), s 45 (3); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>75</sup> *Civil Liability Act 2002* (Tas), s 45 (1) (a);

<sup>76</sup> *Wrongs Act 1958* (Vic), s 35 (3).

<sup>77</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 4 (1).

<sup>78</sup> For example, the *Wrongs Act 1958* (Vic), s 35 (3) (a) provides that the following person is not a volunteer: “a volunteer officer or member within the meaning of the *Country Fire Authority Act 1958* (Vic) while exercising any power conferred, or performing any duty imposed, on him or her by or under that Act or the *Dangerous Goods Act 1985* (Vic)”.

<sup>79</sup> *Civil Liability Act 2003* (Qld), ss 38 (1), 34.

<sup>80</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 3 (1).

<sup>81</sup> *Wrongs Act 1958* (Vic), s 34.

<sup>82</sup> *Civil Liability Act 2002* (Tas), s 44 (1).

<sup>83</sup> *Volunteer Protection Act 2001* (SA), s 3.

<sup>84</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>85</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 6.

included in the term corporation.<sup>86</sup> The *Acts Interpretation Act 1915* (SA) and the *Interpretation Act* (NT), however, do not include a definition of “body corporate” or “corporation”. On the basis that a local council is an incorporated body, it is likely that it would be able to fall under the head of a “body corporate” or “corporation”.

A local government will be included in the definition of community organisation in the New South Wales legislation as an “authority of the state”.<sup>87</sup> *Stack v Brisbane City Council* (1995) 59 FCR 71 held that the Brisbane City Council was an authority of the state for the purposes of the *Patents Act 1990* (Cth). In doing so, Cooper J relied on the reasoning of Gibbs J in *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577 where it was decided that a body will be considered to be an authority of the State where it has been given powers by the State to direct and control the affairs of others *on behalf of the State* and not for private or financial gain.<sup>88</sup> On this basis, a local government would be included as a community organisation in New South Wales.

### ***What is Community Work?***

The most limiting factor on the scope of volunteer protection is that it is only available where volunteers are performing “community work” that is “organised” by a community organisation. This is referred to as the activity test. While meeting the “volunteer” and “organisational” tests are relatively clear for local government and its volunteers, the “activity test” leaves more room for interpretation as the definition of community work requires an analysis of the purpose underlying the work that is being performed.

The definition of community work is exhaustive in all the legislation and differs considerably between each jurisdiction. For work to fall within the definition it must be performed for one of the stated purposes.<sup>89</sup> Many jurisdictions allow for regulations to declare new purposes for community work<sup>90</sup> and to declare certain work not to be community work.<sup>91</sup> There are no such regulations at the time of writing. The Queensland and New South Wales legislation has an additional requirement for community work that the work “not be performed for private financial gain”.<sup>92</sup> This phrase appears to indicate that work will not be considered community work if it creates a profit that is distributed to private individuals.

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<sup>86</sup> See *Legislation Act 2001* (ACT), Dictionary Part 1 (meaning of commonly used words and expressions) where a corporation is defined as including “a body politic or corporate”.

<sup>87</sup> *Civil Liability Act 2002* (NSW), s 60 (1).

<sup>88</sup> *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577 at 580-81 per Gibbs J.

<sup>89</sup> *Civil Liability Act 2003* (Qld), s 38 (1); *Civil Liability Act 2002* (NSW), s 60 (1); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>90</sup> *Civil Liability Act 2002* (NSW), s 60 (1); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>91</sup> *Civil Liability Act 2003* (Qld), ss 38 (1); *Civil Liability Act 2002* (NSW), s 60 (1); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7.

<sup>92</sup> *Civil Liability Act 2003* (Qld), ss 38; *Civil Liability Act 2002* (NSW), s 60 (1).

An important issue to note in the interpretation of the activity test is that the definition focuses on the *purpose of the activity the volunteer is performing* and not the overall purpose of the organisation. The focus on the purpose of the activity means that although a local government may be a community organisation, certain work organised by the local government may come within the definition of community work, and some work may not. This is also exacerbated by the differences in the definitions between jurisdictions. For example, work performed by volunteers for a local government who organises a ‘clean up’ day in the local area may not be included as community work in Queensland and New South Wales as these jurisdictions do not give explicit recognition to such activities. In contrast, this type of work would be included as community work in South Australia,<sup>93</sup> Western Australia,<sup>94</sup> Victoria,<sup>95</sup> Tasmania,<sup>96</sup> Australian Capital Territory<sup>97</sup> and the Northern Territory<sup>98</sup> because of these jurisdictions’ definitions of community work. Included in their purposes are either “conserving or protecting the environment”<sup>99</sup> or “conserving or protecting the natural environment from harm”.<sup>100</sup> However, it is open to a court to not take such a restrictive interpretation and construe the provisions describing the permitted activities as lists of overlapping words in a wide rather than narrow sense. If this is the approach taken, then the sharp division between the purposes may not be as much of a limiting factor. For example, in the situation referred to above, the definition of charity may be interpreted to include a significant proportion of conservation and environmental activities.<sup>101</sup>

The common purposes found in all the state and territory legislation are:

- charitable;
- benevolent;
- educational; and
- sport.<sup>102</sup>

The purposes found only in particular legislation are:

- religious (SA, WA, Vic, Tas, ACT, NT);<sup>103</sup>
- philanthropic (Qld, NSW);<sup>104</sup>
- cultural (Qld, NSW);<sup>105</sup>

<sup>93</sup> *Volunteer Protection Act 2001* (SA), s 3.

<sup>94</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 3.

<sup>95</sup> *Wrongs Act 1958* (Vic), s 36.

<sup>96</sup> *Civil Liability Act 2002* (Tas), s 44 (1).

<sup>97</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 7.

<sup>98</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>99</sup> Western Australia, Victoria, Tasmania, Northern Territory.

<sup>100</sup> South Australia, Australian Capital Territory.

<sup>101</sup> Picarda H, *The Law and Practice Relating to Charities* (3<sup>rd</sup> Ed, Butterworths, 1999) p 164.

<sup>102</sup> *Civil Liability Act 2003* (Qld), s 38 (1); *Civil Liability Act 2002* (NSW), s 60 (1); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>103</sup> *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>104</sup> *Civil Liability Act 2003* (Qld), s 38 (1); *Civil Liability Act 2002* (NSW), s 60 (1).



- promoting literature, science or the arts (SA, WA, Vic, Tas, ACT, NT);<sup>106</sup>
- recreation (Qld, SA, WA, Vic, Tas, ACT, NT);<sup>107</sup>
- amusement (SA, WA, Vic, Tas, ACT, NT);<sup>108</sup>
- tourism (Vic);<sup>109</sup>
- political (Qld, SA, WA, Vic, Tas, ACT, NT);<sup>110</sup>
- conserving or protecting the environment (WA, Vic, Tas, NT);<sup>111</sup>
- conserving resources or protecting the natural environment from harm (SA, ACT);<sup>112</sup>
- caring, treating or otherwise assisting people who need care because of a physical or mental disability or condition (SA, WA, Tas, ACT);<sup>113</sup>
- preserving or promoting historical or cultural heritage (SA, WA, Tas, ACT);<sup>114</sup>
- promoting the interests of a local community (WA, Tas, NT);<sup>115</sup>
- promoting the interests of a community generally or a particular section of it (SA, Vic, ACT);<sup>116</sup> and
- establishing, carrying on or improving a community, social or cultural centre (WA, Vic, TAS, NT).<sup>117</sup>

There are a few noteworthy additions to the definition of community work in some jurisdictions. In Western Australia, in addition to the stated purposes listed above, also included is “for any other purpose approved under section 4 (f) of the *Associations Incorporation Act 1987* (WA).”<sup>118</sup> This suggests an even wider protection may be given in that state. The Australian Capital Territory provides that

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<sup>105</sup> *Civil Liability Act 2003* (Qld), s 38 (1); *Civil Liability Act 2002* (NSW), s 60 (1).

<sup>106</sup> *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>107</sup> *Civil Liability Act 2003* (Qld), s 38 (1); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>108</sup> *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>109</sup> *Wrongs Act 1958* (Vic), s 36.

<sup>110</sup> *Civil Liability Act 2003* (Qld), s 38 (1); *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>111</sup> *Volunteers (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>112</sup> *Volunteer Protection Act 2001* (SA), s 3; *Civil Law (Wrongs) Act 2002* (ACT), s 7.

<sup>113</sup> *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7.

<sup>114</sup> *Volunteer Protection Act 2001* (SA), s 3; *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Civil Liability Act 2002* (Tas), s 44 (1); *Civil Law (Wrongs) Act 2002* (ACT), s 7.

<sup>115</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Civil Liability Act 2002* (Tas), s 44 (1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>116</sup> *Volunteer Protection Act 2001* (SA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Law (Wrongs) Act 2002* (ACT), s 7.

<sup>117</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 3; *Wrongs Act 1958* (Vic), s 36; *Civil Liability Act 2002* (Tas), s 44 (1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (7).

<sup>118</sup> *Volunteer (Protection from Liability) Act 2002* (WA), s 3.



work will not be community work in certain circumstances where it involves acts or threats of violence, or creates a serious risk to the health and safety of the public or a section of the public.<sup>119</sup> These provisions appear to be based on public policy considerations. Such an interpretation would be likely to be given in other jurisdictions, even though not explicitly stated.

In addition to the community work being for any one or more of the stated purposes, in most jurisdictions it must also be “organised” by the community organisation. “Organised” is defined in the legislation as “including directed and supervised”,<sup>120</sup> indicating an inclusive definition that would allow other forms of organisation that come within the natural ordinary meaning of the word to be considered.<sup>121</sup> The condition that the work be “organised” would require volunteers to be formally identified before they begin an activity for a community organisation. The jurisdictions not requiring community work to be organised *per se* are South Australia, the Australian Capital Territory and the Northern Territory. In South Australia<sup>122</sup> and the Australian Capital Territory,<sup>123</sup> the work must be “carried out” for a community organisation (which is not defined). In the Northern Territory,<sup>124</sup> the work must simply be “done” for a community organisation.

Whatever the differences in the wording of these other jurisdictions, it appears there is a requirement that the community organisation somehow control the work done by the volunteer for the protection to be afforded. The wording of the legislation, whether it be “organised”, “carried out” or “done”, suggests the work must be performed under the direction of the community organisation and not just independently by the volunteer. For example, it is likely that the requirement would exclude volunteers who act unilaterally to assist a local government without any prior recognition or instruction by the organisation. This interpretation is supported by the fact that a volunteer will not be able to claim the protection where they are either acting outside the scope of their authorised activities,<sup>125</sup> or contrary to the instructions given by the community organisation<sup>126</sup> when performing community work.

## EXCEPTIONS TO PROTECTION

All jurisdictions provide that although a volunteer may meet the above requirements, in certain circumstances the context of their actions may preclude the operation of the

<sup>119</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 7 (2).

<sup>120</sup> *Civil Liability Act 2003* (Qld), ss 38 (1); *Civil Liability Act 2002* (NSW), s 60 (1); *Volunteer (Protection from Liability) Act 2002* (WA), s 4; *Wrongs Act 1958* (Vic), s 35; *Civil Liability Act 2002* (Tas), s 44 (1); *Commonwealth Volunteers Protection Act 2003* (Cth), s 4 (1).

<sup>121</sup> *Robinson v Barton Eccles Board* (1883) 8 AC 798.

<sup>122</sup> *Volunteers Protection Act 2001* (SA), s 4.

<sup>123</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 8 (1).

<sup>124</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (1).

<sup>125</sup> *Civil Liability Act 2003* (Qld), s 42 (a); *Civil Liability Act 2002* (NSW), s 64 (a); *Volunteers Protection Act 2001* (SA), s 4 (3) (a); *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (3) (a) (i); *Wrongs Act 1958* (Vic), s 36 (1) (a) (i); *Civil Liability Act 2002* (Tas), s 47 (3) (a) (i); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (d) (i); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (2) (a).

<sup>126</sup> *Civil Liability Act 2003* (Qld), s 42 (b); *Civil Liability Act 2002* (NSW), s 64 (b); *Volunteers Protection Act 2001* (SA), s 4 (3) (b); *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (3) (a) (ii); *Wrongs Act 1958* (Vic), s 38 (1) (a) (ii); *Civil Liability Act 2002* (Tas), s 47 (3) (a) (ii); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (d) (ii); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (2) (a).

volunteer protection provisions. Not surprisingly, volunteers will only be immune from incurring personal civil liability where the act or omission attracting liability was either performed:

- “in good faith”<sup>127</sup> (Qld, NSW, WA, Vic Tas);
- “in good faith and without recklessness”<sup>128</sup> (SA, NT); or
- “honestly and without recklessness”<sup>129</sup> (ACT).

This suggests that the policy of the legislation is only to grant immunity where a volunteer’s negligence is the result of honest action or inaction and not where there is some fraud or collusion involved. Similarly, immunity is unlikely to be granted where their conduct is careless in a situation where they could have foreseen some probable or possible harmful consequence, but nevertheless decided to continue with their actions with an indifference to, or disregard of, the consequences.<sup>130</sup>

The other exceptions to protection include where the volunteer was, at the time of the act or omission, either:

- intoxicated<sup>131</sup> (SA, WA, Vic, Tas, ACT, NT);
- intoxicated and failing to exercise due skill and care<sup>132</sup> (Qld, NSW);
- acting outside of the scope of the activities authorised by the community organisation;<sup>133</sup>
- acting contrary to the instructions given by the community organisation;<sup>134</sup> or
- engaging in criminal conduct<sup>135</sup> (Qld, NSW).

The exact requirements of the intoxication exception differ between the jurisdictions. In most jurisdictions it is only required that at the time of the act or omission the volunteer’s ability to carry out the work was “significantly impaired” by “drugs” or a

<sup>127</sup> *Civil Liability Act 2003* (Qld), s 39; *Civil Liability Act 2002* (NSW), s 61; *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (1); *Wrongs Act 1958* (Vic), s 37 (1); *Civil Liability Act 2002* (Tas), s 47 (1).

<sup>128</sup> *Volunteers Protection Act 2001* (SA), s 4; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (1).

<sup>129</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 8 (1).

<sup>130</sup> *R v Nuri* [1990] VR 641.

<sup>131</sup> *Volunteers Protection Act 2001* (SA), s 4 (2); *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (3) (b); *Wrongs Act 1958* (Vic), s 38 (1) (b); *Civil Liability Act 2002* (Tas), s 47 (3) (b); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (c); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (2) (b).

<sup>132</sup> *Civil Liability Act 2003* (Qld), 41; *Civil Liability Act 2002* (NSW), s 63.

<sup>133</sup> *Civil Liability Act 2003* (Qld), s 42 (a); *Civil Liability Act 2002* (NSW), s 64 (a); *Volunteers Protection Act 2001* (SA), s 4 (3) (a); *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (3) (a) (i); *Wrongs Act 1958* (Vic), s 36 (1) (a) (i); *Civil Liability Act 2002* (Tas), s 47 (3) (a) (i); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (d) (i); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (2) (a).

<sup>134</sup> *Civil Liability Act 2003* (Qld), s 42 (b); *Civil Liability Act 2002* (NSW), s 64 (b); *Volunteers Protection Act 2001* (SA), s 4 (3) (b); *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (3) (a) (ii); *Wrongs Act 1958* (Vic), s 38 (1) (a) (ii); *Civil Liability Act 2002* (Tas), s 47 (3) (a) (ii); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (d) (ii); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (2) (a).

<sup>135</sup> *Civil Liability Act 2003* (Qld), s 40; *Civil Liability Act 2002* (NSW), s 62.

“recreational drug”. In Queensland and New South Wales, however, two requirements need to be met. First, the volunteer must be intoxicated by a drug to the extent that their capacity to exercise reasonable care and skill was impaired; and second, they must have actually failed to exercise reasonable care and skill when doing the work. What exactly this extra requirement adds is possibly trivial, as a person who is intoxicated to the point that they cannot exercise reasonable care and skill is likely to fail to exercise reasonable care and skill in their performance of a particular activity. But, it is included in the legislation as a two part test and both elements must be proven in order to remove a volunteer’s ability to rely on the statutory protection.

The definitions of the words “intoxicated” or “drugs” differ between the jurisdictions,<sup>136</sup> most stating it includes alcohol.<sup>137</sup> The most striking difference is that in some jurisdictions there is an explicit statement that the definition of drug is expressed to mean a drug consumed *voluntarily* for “*non-medicinal*” or “*otherwise than for therapeutic*” purposes (SA, WA, Vic, Tas, ACT). Other jurisdictions are either silent on the matter (NT, Qld) or explicitly provide that the exception applies as long as the drug was consumed voluntarily, whether it was consumed for a medication or not (NSW). There are two important consequences of these definitions. First, if intoxication is to provide an exception to protection the drug must have been consumed voluntarily by the volunteer. Second, the “non-medicinal” purpose requirement leaves it open for a volunteer to claim protection where they have consumed a drug voluntarily for medicinal purposes that has produced a side effect; for example, drowsiness. However, the awareness of its effect while performing a certain activity may be an issue for consideration.

The exception that a volunteer will not be able to claim protection where they are either acting outside the scope of their authorised activities, or contrary to instructions, is expressed to apply in the situation where they either knew, or ought (reasonably) to have known, they were acting in this way. It therefore incorporates the concepts of actual and constructive knowledge. In determining liability, the initial inquiry is to delineate what duties are within the scope of the authorised activities of the volunteer and which are not. This determination is often difficult when the volunteer’s general activities are not clearly defined but depend on a local government’s needs at the time. This difficulty is one of the reasons it is extremely important for a local government to prepare job descriptions for its volunteers. When a job description clearly and unambiguously lists a volunteer’s responsibilities, it is much easier to determine which activities fall within the scope of authorised activities and which do not.<sup>138</sup>

Actual knowledge is personal knowledge of a matter in question – the test is subjective and a question of fact.<sup>139</sup> Its operation in this context will usually be clear.

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<sup>136</sup> *Civil Liability Act 2003* (Qld), Sch 2; *Civil Liability Act 2002* (NSW), s 63 (a); *Volunteers Protection Act 2001* (SA), s 3; *Volunteers (Protection from Liability) Act 2002* (WA) s 6 (4); *Wrongs Act 1958* (Vic), s 38 (1) (b), (3); *Civil Liability Act 2002* (Tas), s 47 (4); *Civil Law (Wrongs) Act 2002* (ACT), Dictionary; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 3.

<sup>137</sup> Queensland, New South Wales, South Australia, Victoria, Australian Capital Territory, Northern Territory.

<sup>138</sup> Martinez, n 46 at 154.

<sup>139</sup> *Swinton v China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553.

If a volunteer is told they are only authorised to perform a certain activity, or instructed to perform an activity only in a certain way, then if they act outside of these guidelines the exception will come into operation.

The position is slightly more nebulous when constructive knowledge is invoked. Constructive knowledge is knowledge imputed to a person in circumstances where the presumption of knowledge is so strong that it cannot be rebutted.<sup>140</sup> The test is principally objective, but has a subjective element that allowance, in certain circumstances, may be had for the social and professional background of the particular person. The courts will look at what a reasonable person would do, with the knowledge possessed at the time, if they were in the shoes of the volunteer. It has been recognised that constructive knowledge may be imputed where a person either: wilfully shuts their eyes to the obvious; fails to make inquiries an honest and reasonable person would make; has knowledge of circumstances which would indicate the facts to an honest and reasonable person; or has knowledge that would put an honest and reasonable person on inquiry.<sup>141</sup> There will be situations where the operation of the exception will be clear, for example where a volunteer engages in criminal activity. However, other situations may not be so clear and will require an analysis of what information the volunteer was given. For example, what of the situation where a volunteer is told to perform a certain activity, but given no instructions? Can constructive knowledge be imputed where there are no instructions to which to act contrary?

The operation of these exceptions brings to the forefront the importance of informing volunteers clearly of the scope of their set activities and instructions about how to perform their tasks. This will require that local governments put procedures in place to train, manage and supervise volunteers, particularly when risky activities are involved. Without such procedures, local governments will leave open the possibility of having the liability incurred by a volunteer transferred to their organisation, where, with proper training, the liability may have been avoided.

Only New South Wales and Queensland specifically state that the protection will not be conferred on a volunteer who, at the time of the act or omission, is engaged in conduct that constitutes an offence. “Offence” is not defined in the legislation, but would include both criminal and regulatory offences in Queensland,<sup>142</sup> and both indictable and summary offences in New South Wales.<sup>143</sup> To enable the exception to operate, the standard of proof required is the balance of probabilities. It is likely that in the other states and territories this exception will be subsumed within the heading of acting “outside the scope of authorised activities” or “not in good faith”.

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<sup>140</sup> *Hewitt v Loosemore* (1851) 68 ER 586.

<sup>141</sup> *Baden v Société Générale pour Favoriser le Développement de Commerce et de L'Industrie en France SA* [1992] 4 All ER 161.

<sup>142</sup> *Criminal Code Act 1899* (Qld), s 3.

<sup>143</sup> *Criminal Procedure Act 1986* (NSW), s 3.

## THE EXTENT OF LIABILITY PROTECTED

The legislation is expressed to provide that a volunteer does not incur “any personal civil liability”,<sup>144</sup> “civil liability”,<sup>145</sup> or “is not liable in any civil proceeding”,<sup>146</sup> for anything they have done in good faith while performing community work organised by a community organisation, subject to the types of liability excluded by the Act. Queensland and the Northern Territory are the only jurisdictions that provide some explanation about what is meant by this phrase. In Queensland, the legislation is expressed to apply to “any civil claim for damages for harm”,<sup>147</sup> “claim”, “damages” and harm all being defined.<sup>148</sup> In short, the protection is afforded for claims concerning monetary compensation for personal injury, property damage and economic loss based in tort, contract or statutory duty. Northern Territory on the other hand restricts its legislation to only cover liabilities for personal injury, but is expressed to apply to claims arising under common law and statute.<sup>149</sup>

In those jurisdictions where the meaning of the phrase “civil liability” is not defined or explained, a court is likely to interpret its meaning as including the types of liability protected under the Queensland legislation. This means that most volunteers afforded the statutory protection will not incur any personal civil liability for personal injury, property damage and economic loss caused as a result of their own negligence, whether the claim is made under common law or statute.

Most jurisdictions provide that any provision of the legislation that gives protection from civil liability does not limit the protection from liability given by another part of the legislation, by other Acts, or by law.<sup>150</sup> For example, where a volunteer fire fighter is given protection under another Act, and also the civil liability legislation, both Acts will apply to the situation.

All of the jurisdictions provide that either the volunteer protection provisions, or the whole Act, do not apply to, or in respect of, certain liabilities. Volunteers incurring any of these excluded liabilities in the course of their duties will be outside the operation of the legislation. A volunteer will be unable to claim protection where they incur a civil liability for:

- defamation<sup>151</sup> (NSW, SA, WA, Vic, Tas, ACT);
- compensation for injuries under workers compensation legislation<sup>152</sup> (Qld, NSW, Tas, NT);

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<sup>144</sup> *Civil Liability Act 2003* (Qld), s 39; *Civil Liability Act 2002* (NSW), 61; *Volunteers Protection Act 2001* (SA), s 4; *Civil Law (Wrongs) Act 2002* (ACT), s 8 (1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (1).

<sup>145</sup> *Volunteers (Protection from Liability) Act 2002* (WA), s 6 (1); *Civil Liability Act 2002* (Tas), s 47 (1).

<sup>146</sup> *Wrongs Act 1958* (Vic), s 37 (1).

<sup>147</sup> *Civil Liability Act 2003* (Qld), s 4 (1).

<sup>148</sup> *Civil Liability Act 2003* (Qld), Sch 2.

<sup>149</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT), ss 4 (1), 7 (1).

<sup>150</sup> *Civil Liability Act 2003* (Qld), 7 (2) ; *Civil Liability Act 2002* (NSW), 3A (1); *Volunteers (Protection from Liability) Act 2002* (WA), s 5 (2); *Civil Liability Act 2002* (Tas), s 3A (2).

<sup>151</sup> *Civil Liability Act 2002* (NSW), s 59 (1); *Volunteers Protection Act 2001* (SA), s 4 (1) (b); *Volunteers (Protection from Liability) Act 2002* (WA), s 6 (2); *Wrongs Act 1958* (Vic), s 38 (2) (a); *Civil Liability Act 2002* (Tas), s 47 (2); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (b); *Commonwealth Volunteers Protection Act 2003* (Cth), s 6 (2) (b).

- an injury that is a dust related condition/disease<sup>153</sup> (Qld, NSW, NT);
- an injury resulting from the use of smoking or other use of tobacco products or exposure to tobacco smoke<sup>154</sup> (Qld, NSW, Tas);
- compensation under various bush fire and emergency services legislation<sup>155</sup> (NSW);
- compensation under victims of crime legislation<sup>156</sup> (NSW, Tas);
- compensation under anti-discrimination legislation<sup>157</sup> (NSW, Tas);
- compensation under sporting injuries insurance legislation<sup>158</sup> (NSW);
- a claim, in relation to the supply of goods, in respect of loss or damage in the nature of a personal injury in referred to in various consumer protection legislation<sup>159</sup> (NT);
- a liability required by or under a written law of the State to be insured against<sup>160</sup> (Qld, NSW);
- a liability that falls within the ambit of compulsory third party motor vehicle insurance scheme<sup>161</sup> (SA, ACT); or
- a liability for personal injury or death that falls under certain motor accident compensation legislation<sup>162</sup> (Qld, NSW, WA, Vic, Tas, NT).

The implications of the exclusion of a number of the above liabilities for an individual volunteer are not substantial, as many of them are covered by a statutory scheme of compensation. Potentially, the most important types of liability excluded are defamation and those falling under anti-discrimination or victims of crime legislation. In some jurisdictions, a volunteer incurring liability in the following situations will also not be able to claim protection:

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<sup>152</sup> *Civil Liability Act 2003* (Qld), s 5 (a) (see *Workers Compensation and Rehabilitation Act 2003* (Qld)); *Civil Liability Act 2002* (NSW), s 3B (1) (f), (g) (see *Workers Compensation Act 1987* (NSW); *Workers Compensation (Dust Diseases) Act 1942* (NSW)); *Civil Liability Act 2002* (Tas), ss 3B (3), (4) (See *Workers Rehabilitation and Compensation Act 1988* (Tas)); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 4 (3) (b) (see *Work Health Act* (NT)).

<sup>153</sup> *Civil Liability Act 2003* (Qld), s 5 (b); *Civil Liability Act 2002* (NSW), s 3B (1) (b); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 4 (3) (c).

<sup>154</sup> *Civil Liability Act 2003* (Qld), s 5 (c); *Civil Liability Act 2002* (NSW), s 3B (1) (c); *Civil Liability Act 2002* (Tas), s 3B (1) (b);

<sup>155</sup> *Civil Liability Act 2002* (NSW), s 3B (1) (g) (see *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* (NSW)).

<sup>156</sup> *Civil Liability Act 2002* (NSW), s 3B (1) (g) (see *Victims Support and Rehabilitation Act 1996* (NSW)); *Civil Liability Act 2002* (Tas), s 3B (4) (see *Criminal Injuries Compensation Act 1976* (Tas)); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 4 (3) (d) (See *Crimes (Victims Assistance) Act* (NT)).

<sup>157</sup> *Civil Liability Act 2002* (NSW), s 3B (1) (g) (see *Anti-Discrimination Act 1977* (NSW)); *Civil Liability Act 2002* (Tas), s 3B (4) (see *Anti-Discrimination Act 1988* (Tas));

<sup>158</sup> *Civil Liability Act 2002* (NSW), s 3B (1) (g) (see *Sporting Injuries Insurance Act 1978* (NSW));

<sup>159</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 4 (3) (e) (See *Consumer Affairs and Fair Trading Act* (NT), ss 26, 31, 37, 39 and *Trade Practices Act 1974* (Cth), ss 65C, 65D, 65H)

<sup>160</sup> *Civil Liability Act 2003* (Qld), 43; *Civil Liability Act 2002* (NSW), s 65.

<sup>161</sup> *Volunteers Protection Act 2001* (SA), s 4 (1) (a); *Civil Law (Wrongs) Act 2002* (ACT), s 8 (2) (a); *Commonwealth Volunteers Protection Act 2003* (Cth), s 6 (2) (a).

<sup>162</sup> *Civil Liability Act 2003* (Qld), s 44 (see *Motor Accident Insurance Act 1994* (Qld)); *Civil Liability Act 2002* (NSW), s 66 (see *Motor Accidents Compensation Act 1999* (NSW)); *Volunteers (Protection from Liability) Act 2002* (WA), s 6 (2) (see *Motor Vehicle (Third Party Insurance) Act 1943* (WA); *Wrongs Act 1958* (Vic), s 38 (2) (a) (see *Transport Accident Act 1986* (Vic)); *Civil Liability Act 2002* (Tas), ss 3B (2), 47 (2) (See *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas)); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 4 (3) (a) (see *Motor Accidents (Compensation) Act* (NT)).

- in respect of an intentional act by the volunteer with intent to cause injury or death<sup>163</sup> (NSW, Tas); or
- in respect of an intentional act by the volunteer that is sexual assault or other sexual misconduct<sup>164</sup> (NSW, Tas).

It is likely that any volunteer in the other jurisdictions that incurs a liability in regard to the same kind of conduct would not be afforded protection by a court on public policy grounds.

## **LIABILITY OF A LOCAL GOVERNMENT AS A COMMUNITY ORGANISATION**

In all jurisdictions apart from Queensland and New South Wales, any liability incurred by a volunteer that is protected is statutorily transferred to the local authority as a community organisation.<sup>165</sup> As mentioned above, this transfer of liability creates a statutory exception to the basic rule that vicarious liability attaches to the relationship of employer and employee, as volunteers have no contract of service and do not receive any consideration or payment for services.

In South Australia and the Australian Capital Territory, the provisions provide for two means by which a volunteer may be sued personally. These are when:

- it is clear from the circumstances of the case that the protection does not apply; or
- the injured person brings an action against the community organisation and the community organisation disputes, in a defence filed to the action, that it is liable for the act or omission of the volunteer.<sup>166</sup>

The precise meaning of “clear from the circumstances of the case” is likely to proceed on a case by case basis. It will generally only be clear from the circumstances of the case that the protection given does not apply where one of the exceptions stands out as being particularly applicable. For example, where the liability is for defamation, or covered by a compulsory third party motor vehicle insurance scheme. Where there is some factual matter in dispute the situation will not be so clear, for example, whether the particular work being performed by the volunteer comes under the heading of community work. The “defence” exception aims to avoid parties joining volunteers as defendants at first instance in civil liability actions, and hence preventing the volunteer from incurring the stress and expense of unnecessary litigation. Through the exception, the onus is shifted from the litigant to the community organisation to decide whether they want to challenge the availability of protection for the volunteer.

Some local authorities may decide to manage the risk of being liable for the acts and omissions of volunteers by seeking an indemnity from them for any losses they cause.

<sup>163</sup> *Civil Liability Act 2002* (NSW), s 3B (1) (a); *Civil Liability Act 2002* (Tas), s 3B (1) (a).

<sup>164</sup> *Civil Liability Act 2002* (NSW), s 3B (1) (a); *Civil Liability Act 2002* (Tas), s 3B (1) (a).

<sup>165</sup> *Volunteers Protection Act 2001* (SA), s 5 (1); *Volunteers (Protection from Liability) Act 2002* (WA), s 7 (1); *Wrongs Act 1958* (Vic), s 37 (2); *Civil Liability Act 2002* (Tas), s 48(1); *Civil Law (Wrongs) Act 2002* (ACT), s 9 (1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (3).

<sup>166</sup> *Volunteers Protection Act 2001* (SA), s 5 (2); *Civil Law (Wrongs) Act 2002* (ACT), s 9 (2).

In Western Australia,<sup>167</sup> Victoria,<sup>168</sup> Tasmania,<sup>169</sup> the Northern Territory<sup>170</sup> and the Commonwealth,<sup>171</sup> the legislation provides that any indemnity agreement given by a volunteer against a liability that the community organisation incurs under the Act is ineffectual and unenforceable. South Australia and the Australian Capital Territory are silent on the matter. In contrast, in both Queensland and New South Wales, there is a provision stating that the Act:

Does not prevent the parties to a contract from making an express provision for their rights, obligations and liabilities under the contract in relation to *any matter* to which this Act applies and *does not* limit or otherwise affect the operation of the express provision<sup>172</sup> (emphasis added).

This leaves open the possibility that, in those jurisdictions, a local government may enter into an enforceable contract of indemnity with a volunteer. Such a contract may involve the volunteer agreeing to compensate any loss sustained by the local government in proceedings against them by third parties related to acts and omissions of the volunteer, excluding their right to rely on the volunteer protection provisions. In order to ensure its enforceability, special attention would have to be given in any such agreement as to whether it indicated a clear intention to exclude the volunteer protection provisions, that genuine consent was given by the volunteer, and the possible unconscionability of the terms. There is also the possibility that such an agreement would be unenforceable due to lack of consideration, unless the agreement was entered into as a deed under seal.

In the United States, such agreements are allowed under the federal legislation as the VPA specifically states that the protection given to volunteers

shall not be construed to affect any civil action brought by any nonprofit organisation or any governmental entity against a volunteer of such organisation or entity.<sup>173</sup>

If a person is immune from liability, he or she is generally not subject to a claim of contribution from a joint tortfeasor. However, this provision leaves it open for a government or nonprofit organisation to enter into and enforce an agreement against a volunteer that operates to hold harmless, or indemnify, the volunteer organisation for actions undertaken by the volunteer that damage third parties and cause the organisation to defend a claim filed by a third party. These are known as “exculpatory agreements” in the United States and have the effect of the volunteer agreeing to release the organisation from potential tort liability for future conduct covered in the agreement.<sup>174</sup>

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<sup>167</sup> *Volunteers (Protection from Liability) Act 2002* (WA), s 8.

<sup>168</sup> *Wrongs Act 1958* (Vic), s 40.

<sup>169</sup> *Civil Liability Act 2002* (Tas), s 49.

<sup>170</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 7 (5).

<sup>171</sup> *Commonwealth Volunteers Protection Act 2003* (Cth), s 9.

<sup>172</sup> *Civil Liability Act 2003* (Qld), 7 (3); *Civil Liability Act 2002* (NSW), s 3A (2). This provision cannot be used to override the sections of the Act relating to the assessment of personal injury: *Civil Liability Act 2003* (Qld), Chapter 3; *Civil Liability Act 2002* (NSW), Part 2.

<sup>173</sup> *The Volunteer Protection Act 1997* 42 U.S.C., § 14503 (b).

<sup>174</sup> King J, “Exculpatory Agreements for Volunteers in Youth Activities – The Alternative to “Nerf”® Tiddlywinks” (1992) *Ohio State Law Journal* 53 (3) 683, 683.



Commentators in the United States have suggested that “exculpatory agreements” often raise more issues than they resolve.<sup>175</sup> Most strikingly, they shift the assumption of risk from the organisation to the volunteer. This raises the question of which party is in a more appropriate position to reasonably foresee the risk involved in a particular activity; given that a volunteer does not have the resources or control that an organisation has in this regard.<sup>176</sup> Another issue raised by the practice of entering into such agreements is the potential loss of volunteers by an organisation. In attempting to avoid liability, it is possible that an organisation may lose its workforce – volunteers are likely to be wary of donating their time only to be held liable for tortious conduct.<sup>177</sup> In the Australian arena, such a practice could therefore be potentially detrimental to a local government’s capacity to carry out its aims, as without the benefit of volunteers, many activities would be more difficult to undertake. We suspect that public opinion and adverse media comment on local government seeking indemnities from their volunteers would be a serious barrier to such conduct.

## PROPOSALS FOR REFORM

The different approach taken by Australian jurisdictions to the volunteer protection reforms has produced an inconsistent outcome for local governments. A number of the jurisdictions include provisions that, if adopted, would provide local governments with an opportunity to either limit the liability they incur from protected volunteers, or be in a better position to defend an action brought on the liability. It is proposed that these provisions should be included in all legislation.

Western Australia,<sup>178</sup> Victoria<sup>179</sup> and Tasmania<sup>180</sup> provide that the transfer of a volunteer’s liability to the community organisation does not override any protection that would have applied to the community organisation if the thing done, or not done, by the volunteer was done, or not done, by the community organisation. This provision preserves any protection from liability that the community organisation may have arising from contractual arrangements with a third party.<sup>181</sup> An example of such a contractual relationship would be a contract of insurance for public liability, in which the community organisation would be indemnified by the insurance company for liabilities they incur. These jurisdictions also provide for the situation in which a number of organisations are involved in an event. The legislation provides that if more than one community organisation is involved in organising community work, the transfer of liability applies to the community organisation that principally

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<sup>175</sup> In the United States, the absence of specific statutory authorisation for such agreements is an issue canvassed in much of the commentary on these provisions. Although the federal statute does not prevent the entering of such agreements, they may not be enforced due to a number of reasons. For a discussion of this area see King, n 179 at 711-732. Because of the specific statutory authorisation in the Australian provisions this issue will not be discussed.

<sup>176</sup> Martinez, n 46 at 156.

<sup>177</sup> Martinez, n 46 at 156.

<sup>178</sup> *Volunteers (Protection from Liability) Act 2002* (WA), s 7 (2);

<sup>179</sup> *Wrongs Act 1958* (Vic), s 39 (2).

<sup>180</sup> *Civil Liability Act 2002* (Tas), s 48 (2).

<sup>181</sup> Explanatory Memorandum, *Volunteers (Protection from Liability) Bill, 2002* (WA), 5; Explanatory Memorandum, *Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002* (Vic), 8.

organised the work.<sup>182</sup> This would allow a council that participates in a large event with other organisations to avoid the transfer of liability if they were only lending support, rather than organising the whole event.

Under the Commonwealth legislation, the transfer of liability under the Act to the Commonwealth creates a statutory obligation on the volunteer to, upon request, assist it with the defence of any action taken on the liability incurred under the legislation.<sup>183</sup> Such assistance may include attending meetings, providing statements about the event, providing supporting documents or appearing as a witness in court.<sup>184</sup> The provision does not require the volunteer to give any financial assistance. It is suggested that the inclusion of this provision in all legislation would ensure that the benefit volunteers receive from the legislation is balanced with a responsibility to ensure that the local governments are not disadvantaged in proceedings due to lack of cooperation from the volunteer.

## CONCLUSION

As can be appreciated by the description of the different provisions in each jurisdiction, although the provisions follow a general model, there are enough differences to destroy any notion of uniform legislation. Apart from the simplicity that uniform legislation would bring to those seeking an understanding of the provisions across jurisdictions, particularly for national community service organisations, there are other consequences. Insurance policies are constructed with all Australian jurisdictions in contemplation and any legislative effect of lessening insurer's exposure to liability of volunteers may not be reflected in premiums because of the uncertainty of coverage in all jurisdictions. Consequently, the aim of the reforms in lowering premiums may not be achieved by the legislation in its current form.

The volunteer protection provisions will, however, have a major impact on the way local governments deliver community services by engaging volunteers. Local governments, in many jurisdictions, are now in a position to have liabilities incurred by their volunteers transferred to them. Even where this transfer is not explicit, the potential for such a transfer by the principle of vicarious liability is a real possibility. As a result, local governments will be expected to take far more care to appropriately manage the risks that this poses and to ensure that adequate risk management and insurance is in place to cover potential liabilities.

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<sup>182</sup> *Volunteers (Protection from Liability) Act 2002* (WA), s 7 (3); *Wrongs Act 1958* (Vic), s 39 (2); *Civil Liability Act 2002* (Tas), s 48 (3).

<sup>183</sup> *Commonwealth Volunteers Protection Act 2003* (Cth), s 8.

<sup>184</sup> Explanatory Memorandum, *Commonwealth Volunteers Protection Bill 2002* (Cth) 6.